

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA MAY STANLEY

Claimant

VS.

LCA MARY PECK

Respondent

AND

HARTFORD ACCIDENT & INDEMNITY

Insurance Carrier

Docket No. 256,159

ORDER

Respondent and its insurance carrier (respondent) request review of the March 30, 2004 Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ granted claimant's request for post award medical treatment specifically designating Dr. J. Stanley Jones as the treating physician. That same order did not grant attorney's fees but instead, took that matter "under advisement pending the submission of his [Mr. Winfrey's] hours and fees."¹

Respondent and its carrier (respondent) appeal this Order alleging that it had properly furnished medical treatment to claimant with Dr. David Clymer and as such, the ALJ exceeded her authority in appointing Dr. Jones as the treating physician. Respondent also contends the ALJ erred in granting attorney's fees in connection with this request.

Claimant argues that the Board does not have jurisdiction to hear this appeal because K.S.A. 44-551(b) and K.S.A. 44-510k do not establish jurisdiction for review of a

¹ ALJ Order (Mar. 30, 2004) at 2.

preliminary hearing. Claimant also argues that respondent did not voluntarily agree to provide medical care through Dr. Clymer before the preliminary hearing. Rather, Dr. Clymer was merely asked to evaluate claimant's present condition. For that reason, claimant should be allowed to select her physician, in this instance, Dr. Jones, to direct her ongoing treatment. Accordingly, claimant requests that the ALJ's Order be affirmed in all respects and that a finding be made that claimant's attorney fees are not only appropriate, but should include fees for representing claimant in this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) finds the ALJ's Order should be reversed.

On October 21, 2003, an Award was issued which granted claimant future medical benefits upon agreement of the parties or upon proper application to the Director. Thereafter, on February 17, 2004, claimant filed an E-4 Application for Post Award Medical specifically requesting care with Dr. J. Stanley Jones, a local physician who had been treating claimant at respondent's direction during the course of her claim.

Before a hearing could be held on the E-4, respondent directed claimant to Dr. David J. Clymer for an evaluation. Claimant complied with this request and on March 1, 2004, Dr. Clymer issued a report indicating that claimant should have physical therapy. He further indicated that claimant's request to be seen by Dr. Jones was "reasonable." According to respondent, "[o]n March 12, 2004, Dr. Clymer was designated as the authorized treating physician by the [e]mployer, and it was planned to provide [c]laimant with a formal physical therapy program in Wichita."² Thereafter, on March 17, 2004, Dr. Clymer again wrote to respondent's counsel and indicated "I still think it would be somewhat helpful to at least see if Dr. Jones, her previous surgeon, has any other suggestions. If there are any suggestions forthcoming those would be helpful to me in the monitoring her physical therapy program."³

A hearing was held on March 30, 2004 and Dr. Clymer's recent medical reports were offered into evidence. Although the hearing was initially believed (by the ALJ) to be a preliminary hearing, it was clear by the end of the proceeding that the proceeding was that of a post-award medical request. Indeed, the transcript is entitled "Post-Award Hearing" and was initiated by claimant following the filing of an E-4. No terminal dates were set or requested at this hearing. The parties merely submitted their medical reports without any deposition testimony or objection, and the claimant testified as to her need for

² Respondent's Memorandum in Support of Application for Review by the Workers' Compensation Appeals Board (filed April 26, 2004) at 3.

³ P.A.H. Trans., Ex. 6.

further medical treatment as well as her preference to have that treatment provided closer to home rather than in Kansas City.

Immediately following the hearing the ALJ issued an Order granting claimant's request for treatment, designating Dr. Jones as the treating physician. The ALJ took counsel's request for attorneys fees under advisement pending presentation of an itemized bill.

At the outset, the Board must first consider whether it has jurisdiction to consider the issue raised by the parties. After reviewing the parties' briefs and the transcript along with the exhibits offered by the parties, the Board concludes the hearing held on March 30, 2004 was in the nature of a post-award proceeding. Claimant initiated the process by filing an E-4, a recently enacted statutory procedure, which is required by K.S.A. 44-510k for requesting medical treatment following the issuance of a final Award. At one point during the hearing, the ALJ believed the parties were presenting a preliminary hearing issue but she was corrected by claimant's counsel.⁴ Even when claimant's counsel attempted to illicit testimony from claimant as to what Dr. Clymer said to her during his most recent examination, counsel for respondent objected. The ALJ replied as follows:

THE COURT: Well, you can always depose Dr. Clymer if you wish. But he is correct, Mr. Winfrey. Post-award medical is a bit more restrictive than preliminary hearings, and any medical that comes in has to be upon agreement of the parties or it has to be by deposition. So if you are going to continue with this line of questioning we will have to delay the case to allow for Dr. Clymer's deposition.

Claimant's counsel went on to reply:

MR. WINFREY: I am not going to continue with questioning regarding what he said. . . That creates a little bit of a problem for me. I don't want to keep this off--I don't want to put off the decision on this. But I was going to ask her, Judge, whether or not Dr. Clymer ever offered to provide her treatment. And that wouldn't be--I don't know if that is a problem with your ruling or not.⁵

At no point did either party request any terminal dates. Indeed, it appeared that they simply agreed to the admission of the medical evidence without need for any deposition. The ALJ certainly made it clear that the hearing could be adjourned or the record left open, if either counsel had an interest in deposing Dr. Clymer but neither elected to pursue that option.

⁴ Id. at 4.

⁵ Id. at 15-16.

The Board finds it has jurisdiction to consider this matter as the proceedings on March 30, 2004 were consistent with a post-award request for medical treatment. Thus, the Board has jurisdiction to hear respondent's appeal.⁶ Claimant's argument to the contrary is misplaced.

Turning to the issue at hand, the Board finds the ALJ's ultimate finding that Dr. Jones should examine claimant, should be affirmed, albeit for a different reason than that offered by the ALJ. Respondent designated Dr. Clymer as the treating physician on March 12, 2004. Dr. Clymer, in turn, twice informed respondent that an evaluation by Dr. Jones was "reasonable". As the designated treating physician, Dr. Clymer had the authority to refer claimant to Dr. Jones for a second evaluation and opinion. As such, the Board finds that Dr. Jones was authorized to evaluate claimant and offer treatment suggestions. Thus, the ALJ's finding on that issue is hereby affirmed.

Respondent argued that claimant's request was, in reality, a request for a change of physician under K.S.A. 44-510h(b)(1). Claimant certainly could have asserted such a request but had she done so, the ALJ's determination to designate Dr. Jones as a treating physician would have exceeded her authority. In the event a treating physician is found to be unsatisfactory, the statute contemplates an order compelling the respondent to provide a list of three physicians from which claimant can select a new provider. An ALJ has no authority to ignore the statutory mandates and designate the physician, unless the respondent has failed to provide medical treatment.

In light of the foregoing conclusions, the Board must reverse paragraphs 5 and 6 within the ALJ's Order. Under these circumstances, the distance between claimant's home and Dr. Clymer's office is irrelevant and Dr. Jones is, consistent with Dr. Clymer's referral, authorized to evaluate claimant and provide treatment suggestions. He is not considered the "authorized treating physician for *all treatment, tests and referrals*".⁷ Rather, he is authorized to evaluate claimant and provide treatment suggestions.

As for the request for attorneys fees, there appears to be no justiciable controversy. The ALJ took this issue under advisement pending receipt of an itemized bill. Thus, there is no determination upon which an appeal can be based. The Board has no authority to consider this particular issue and will remand the case as per claimant's counsel's request for further consideration consistent with this Order.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 30, 2004, is affirmed, in part, and reversed, in part.

⁶ K.S.A. 44-510k.

⁷ ALJ Order (Mar. 30, 2004) at 2.

IT IS SO ORDERED.

Dated this _____ day of May 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

This Board Member respectfully dissents from the majority's decision. Claimant's request for post-award medical benefits was, in essence, a request for a change of physician pursuant to K.S.A. 44-510h(b)(1). Consistent with the terms of the statute, the ALJ should have directed respondent to provide a list of three local physicians from which claimant could choose one to direct her care rather than appoint Dr. Jones as the treating physician. The distance between claimant's home in Augusta, Kansas, and Dr. Clymer's office in Kansas City, Missouri, is very relevant. An injured worker should not be required to travel 200 miles for medical treatment when local providers are available.

BOARD MEMBER

c: Gary A. Winfrey, Attorney for Claimant
Chris D. Werner, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director